

STATE OF MICHIGAN
COURT OF APPEALS

G. C. TIMMIS & COMPANY,

Plaintiff-Appellee,

v

GUARDIAN ALARM COMPANY,

Defendant-Appellant.

FOR PUBLICATION
August 24, 2001
9:05 a.m.

No. 210998
Oakland Circuit Court
LC No. 97-549069

Updated Copy
October 26, 2001

Before: M.J. Kelly, P.J., and White and Wilder, JJ.

WHITE, J. (*dissenting*).

I respectfully dissent. The question is whether the circuit court erred in denying defendant's motion for summary disposition based on the real estate brokers licensing act. Because the documentary evidence submitted below, taken in a light most favorable to plaintiff, showed that there were genuine issues of material fact concerning the applicability of the statutory bar, the court did not err.

MCL 339.2512a provides:

A person engaged in the business of, or acting in the capacity of, a person required to be licensed under this article, shall not maintain an action in a court of this state for the collection of compensation *for the performance of an act or contract for which a license is required by this article* without alleging and proving that the person was licensed under this article at the time of the performance of the act or contract. [Emphasis added.]

The acts or contracts for which a license is required are set forth in MCL 339.2501(d), which defines "real estate broker." The pertinent part of that definition includes an entity that

sells or offers for sale, buys or offers to buy, leases or offers to lease, or negotiates the purchase or sale or exchange of a business, business opportunity, or the goodwill of an existing business for others

The act thus bars plaintiff from maintaining an action to collect compensation for an act in selling or offering to sell, buying or offering to buy, leasing or offering to lease, or negotiating

the purchase or sale of a business, business opportunity, or the goodwill of a business, or its performance of a contract involving such an act.

Plaintiff provided an affidavit indicating that it seeks compensation for investment banking services involving advice regarding the home security industry, and the identification of appropriate target companies for defendant to seek to acquire. Plaintiff was to be paid a success fee for any target contacted by plaintiff on defendant's behalf that was eventually acquired within two years of the termination of the parties' agreement. Plaintiff claims that it considered various enterprises in the home security industry, identified and contacted MetroCell as an appropriate target for defendant, and had extensive discussions with defendant regarding the nature of the industry, strategy, pricing, marketing, and the implications of such an acquisition. Negotiations commenced and were placed on hold. Six months later defendant acquired MetroCell without notifying plaintiff.

Taken in the light most favorable to plaintiff, there is a genuine issue whether plaintiff seeks compensation for the performance of an act or contract for which a license is required by the statute. Plaintiff does not claim compensation for offering to buy MetroCell or for negotiating respecting a sale. Rather, plaintiff seeks compensation for providing information concerning the nature of the industry, the approach defendant should take to strengthen its position in the industry, and the type of business it should attempt to acquire, and for targeting MetroCell as such a business. Regarding the contract, plaintiff asserts that its agreement with defendant contemplated that it would provide such advice and identify appropriate targets, and that it would be entitled to compensation for a target contacted by it that was acquired. Defendant denies that there was any agreement. Accordingly, one cannot properly conclude as a matter of law that if there was a contract, it required plaintiff to be licensed, because, at least, it has not been established that any contract required plaintiff to offer to buy the business or to negotiate the purchase of the business.

I agree that the mere fact that plaintiff is an investment banking company does not exempt it from the requirements of the act if the act is otherwise applicable. Nevertheless, the nature of the services for which plaintiff seeks compensation is made relevant by the express terms of the act.

Defendant relies on a letter written by plaintiff's former attorney asserting that plaintiff represented defendant in negotiations with MetroCell's parent company. Plaintiff asserts that this characterization was factually inaccurate,¹ and that, in any event, plaintiff performed additional services.

¹ In its brief on appeal, plaintiff cites deposition testimony of defendant's principal, Milton Pierce, in which Pierce answered "no" to the question whether he would classify the dealings he was having with MetroCell through plaintiff as negotiations. Defendant correctly observes that this deposition was not presented to the circuit court in support of plaintiff's response to defendant's motion. However, the deposition was not taken until months after the motion was heard.

Lastly, *Cardillo v Canusa Extrusion Engineering, Inc*, 145 Mich App 361; 377 NW2d 412 (1985), and the cases cited therein do not compel a different conclusion. Relying on *Smith v Starke*, 196 Mich 311; 162 NW 998 (1917), and *Krause v Boraks*, 341 Mich 149; 67 NW2d 202 (1954), the *Cardillo* Court held that even though the plaintiffs did not negotiate the transaction, "in finding a purchaser for defendants' assets under a commission agreement, plaintiffs were subject to the real estate brokers licensing statute and, lacking such a license, plaintiffs' suit for compensation must fail." *Cardillo, supra* at 371. *Smith* and *Krause* held that finding a purchaser for another's property is of the essence of brokerage services, *Smith, supra* at 314, and that an attorney engaging solely in the function of obtaining a prospective purchaser for an interest in realty, in conjunction with a broker, is acting as a broker. *Krause, supra* at 155. *Cardillo, Smith*, and *Krause* all involved actions to recover compensation for the successful procurement of a buyer for identified property.

In the instant case, following *Cardillo*, the majority focuses the inquiry on the activities performed and the character of the property, and then concludes:

Here, plaintiff found business assets for defendant to purchase, conduct that falls squarely within the definition of activities performed by a "real estate broker" under the act. Notwithstanding plaintiff's assertions that its conduct consisted of "investment banking services" rather than "real estate broker services," it is clear that plaintiff's conduct in attempting to locate business assets for purchase by defendant constitutes action of a "real estate broker" as defined by statute. [*Ante* at ____.]

It does not, however, follow from *Cardillo* and the cases discussed therein that plaintiff's conduct in attempting to locate business assets for defendant to purchase constitutes the action of a real estate broker under the statute. I would not equate the finding of a buyer for identified property or assets of the client with the rendering of advice regarding the client's position in its industry and the identification and contacting of business opportunities within the industry that the client might wisely pursue. Here, plaintiff undertook to provide investment advice and to identify and contact appropriate targets for acquisition. *Cardillo* does not characterize these activities as those of a real estate broker under the statute.

Under all the circumstances, I conclude the circuit court did not err in concluding that summary disposition was inappropriate. I would affirm the circuit court's conclusion that genuine issues of material fact remained and remand for further proceedings.

/s/ Helene N. White